90-300

No.

SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICKY ALLEN HAYS - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Was the petitioner denied due process of law when he was convicted of Conspiracy to Possess with Intent to Distribute Cocaine and Marijuana where there was insufficient evidence to support a finding of guilt beyond a reasonable doubt?

2. Was the petitioner properly assessed a $500,000 fine under the Federal Sentencing Guidelines where the facts did not so warrant?

3. Was the petitioner properly sentenced by the district court under the Federal Sentencing Guidelines where the district court, by an exercise of its discretion, departed from the Guidelines?

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Constitutional Provisions	2
Statement of the Case	2– 3
Reasons for Granting the Writ	3–13
Conclusion	13
Appendix	1a–13a
Appendix A (Opinion of Court of Appeals)	1a–12a
Appendix B (Order Denying Petition for Rehearing)	13a

TABLE OF AUTHORITIES

Constitutional Provisions: PAGE

United States Constitution, Fifth Amendment 2

Federal Sentencing Guidelines:

Section 4A1.3 12
Section 5E1.2(d) 7
Section 5K2.0 9

Cases:

Jackson v. *Virginia*, 443 U.S. 307 (1979) 3
United States v. *Anders*, 899 F.2d 570 (6th Cir. 1990) 12
United States v. *Brown*, 903 F.2d 540 (8th Cir. 1990) 12, 13
United States v. *Cepeda*, 768 F.2d 1515 (2nd Cir. 1985) 6
United States v. *Hays*, 899 F.2d 515 (6th Cir. 1990) 6, 10, 11, 12
United States v. *Hernandez-Palacios*, 838 F.2d 1346 (5th Cir. 1988) 6
United States v. *Maddalena*, 893 F.2d 815 (6th Cir. 1989) 12

No.

SUPREME COURT OF THE UNITED STATES

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RICKY ALLEN HAYS - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals decided and filed on March 29, 1990.

OPINION BELOW

The opinion of the Court of Appeals decided and filed on March 29, 1990 (Appendix A) is reported at 899 F. 2d 515 (6th Cir. 1990). A petition for rehearing was filed en banc. The order of the Court of Appeals denying the petition for rehearing was entered on May 16, 1990 (Appendix B).

JURISDICTION

The opinion of the court of appeals (Appendix A) was decided and filed on March 29, 1990; and a timely petition for rehearing was denied by order of the Court of Appeals for the Sixth Circuit (Appendix B) on May 16, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. sec. 1254(1) and Supreme Court Rule 13.4.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial in the Western District of Kentucky of conspiracy to unlawfully possess with intent to distribute and to distribute cocaine and marijuana, in violation of 21 U.S.C. 846, and with possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1).

The petitioner was charged in a two-page indictment with conspiring with persons known and unknown to the Grand Jury to possess with intent to distribute cocaine and marijuana.

On January 4, 1989, petitioner was sentenced to a term of 240 months as to Count 1 and 120 months as to Count 2 of the Indictment, to run concurrently. Petitioner was further ordered to pay a total Special Penalty Assessment of $100.00. Upon release from imprisonment, petitioner shall be placed on supervised release for a term of five years on each Count, to run concurrently. The Court then ordered petitioner fined $500,000 as to Count 1 of the Indictment, as well as the costs of incarceration and supervised release.

Petitioner appealed his conviction for conspiracy to possess cocaine and marijuana with intent to distribute (Count 1) and also the fine imposed. The government appealed the district court's departure from the guidelines.

The court of appeals affirmed the conviction stating "there was ample evidence to support [petitioner's] conviction for conspiracy." The court of appeals further upheld the fine imposed by stating "we cannot say that the district court's conclusion that he could pay a half million dollar fine was clearly erroneous."

Furthermore, the court of appeals remanded the case for resentencing because it agreed with the government that "the district court improperly departed from the guidelines because the factors it relied on to reduce [petitioner's] sentence are not mitigating circumstances under the guidelines." [Please refer to opinion reproduced in Appendix A.]

REASONS FOR GRANTING THE WRIT

1. The Petitioner Was Denied Due Process of Law When He Was Convicted of Conspiracy to Possess With Intent to Distribute Cocaine and Marijuana Where There Was Insufficient Evidence to Support a Finding of Guilt Beyond a Reasonable Doubt?

This Court held in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), that the standard for review of insufficient evidence is:

> whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*, at 319.

In the present case, it is respectfully urged that "no rational trier of fact could have found proof of guilty beyond a reasonable doubt," *Id.*, at 324, so that review should be granted to reverse petitioner's conviction.

The sparse evidence regarding petitioner's involvement in a conspiracy is as follows. Detective Gary Epperson with the Jefferson County Police Department testified for the United States. On May 23 and 24, 1988, Epperson used an informant to investigate Steve Gordon. He stated that he provided his informant with $300 to purchase an eight ball of cocaine. At 9:00 p.m., on May 23, 1988, petitioner and Gordon drove into the parking lot at the corner of Winkler and Rodman. Gordon exited the vehicle and walked into the apartment where the informant was waiting. After being notified that the cocaine had been purchased, Epperson followed petitioner and Gordon from the parking lot.

Epperson then testified that petitioner took Gordon home and then returned to his own apartment. On May 24, 1988, another buy was arranged with the same informant. Epperson stated that petitioner and Gordon again arrived together; Gordon entered the apartment, while petitioner waited in the parking lot. Officers followed petitioner and Gordon from the parking lot, and this time they drove to petitioner's apartment.

Based on these observations, Epperson obtained a search warrant for petitioner's apartment on May 25, 1988. [Transcript of Evidence, hereinafter referred to as T.E., Vol. 1, pp. 52-54.] During the search of petitioner's apartment, Epperson found some records. He testified:

> People involved in sale of large quantities of drugs, marijuana and cocaine, keep records because they normally front a lot of drugs out, which, in other words, I might give you an ounce of cocaine and not require any payment at this time, but as you sell that ounce of cocaine, you come back and pay me what you owe me. [T.E., Vol. 1, pp. 86-87.]

In interpreting these records, Epperson referred to the initials and names thereon as "customers" of petitioner's. [T.E., Vol. 1, p. 90.]

Epperson painstakingly testified as to each of the initials and names on these records and listed for the jury what he interpreted to be amounts owed to petitioner from these individuals. He testified these amounts were owed for various quantities of drugs "fronted" by petitioner. [T.E., Vol. 1, pp. 91-105.] Epperson testified that where there were multiple eight ball purchases, the individual would be buying for "redistribution" not for personal use. [T.E., Vol. 1, pp. 120, 124.]

Epperson was the sole witness on the conspiracy count. He testified as to his interpretation of various records found in the apartment of petitioner. He testified that these records listed various customers of petitioner. None of these initials or names were ever identified. As the prosecutor admitted in his closing argument, a willing seller and a willing buyer do not make a conspiracy. [T.E. Vol. 2, p. 181.]

There was no testimony from Epperson that Gordon was a co-conspirator with petitioner. In fact, in his interpretation of the records, Epperson did not show anything concerning the sale of cocaine to Gordon from petitioner on May 23 or 24, 1988. There was no evidence that petitioner provided Gordon with the cocaine used in the sale by Gordon to the informant. As the jury was instructed, mere presence at the scene of a transaction or the mere fact that certain persons may have associated with each other does not necessarily establish proof of a conspiracy. [T.E., Vol. 2, pp. 208-209.]

The Second Circuit stated in *United States* v. *Cepeda*, 768 F. 2d 1515 (2nd Cir. 1985), "a person may be convicted of conspiring with persons whose identities are unknown . . . But it is also true that the evidence must support the existence of such unknown persons and their complicity." *Id.* at 1516-1517.

The Fifth Circuit has also stated that a "defendant may be convicted of conspiring with other unknown persons if the indictment asserts that other such persons exist and the evidence supports their existence and the existence of a conspiracy." *United States* v. *Hernandez-Palacios*, 838 F.2d 1346, 1349 (5th Cir. 1988). In that case, the court held, "even if there was a person named 'Elias' . . . [this was] not sufficient to permit the conclusion beyond a reasonable doubt that [he] together with Hernandez were members of a conspiracy to possess or import marijuana." *Id.*

The court concluded, "While the indictment alleged that there were other unknown conspirators, the evidence does not support the existence of any agreement or of any other conspirators with whom an agreement might have been reached." *Id.*

The Sixth Circuit in the present case has stated that petitioner "conspired with Gordon and others to sell cocaine and marijuana," however, petitioner was not charged with conspiring with Gordon, and there was no evidence that the "others" existed or agreed with petitioner. [*United States* v. *Hays*, 899 F.2d 515, 518 (6th Cir. 1990).]

It is respectfully submitted that petitioner was denied due process of law when he was convicted of conspiracy to possess cocaine and marijuana with intent to distribute where the evidence was insufficient to prove this offense beyond a reasonable doubt; and review should be granted

to resolve the conflict between the decision of the Sixth Circuit and the decisions of both the Second and Fifth Circuits.

2. Was the Petitioner Properly Assessed a $500,000 Fine Under the Federal Sentencing Guidelines Where the Facts Did Not So Warrant?

In the Federal Sentencing Guidelines Manual, issued by the United States Sentencing Commission, under section 5E1.2(d):

> In determining the amount of the fine, the court shall consider:
>
> . . .
>
> (2) the ability of the defendant to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources. . . .

In the *Commentary* to that section, note 6, the Sentencing Commission stated,

> The existence of income or assets that the defendant failed to disclose may justify a larger fine than that which otherwise would be warranted under sec. 5E1.2. The court may base its conclusion as to this factor on information revealing significant unexplained expenditures by the defendant or unexplained possession of assets that do not comport with the defendant's reported income. . . .

The facts in petitioner's case show the only thing he owned at the time of his arrest "is half interest in an old, rundown house on Brooks Street that he owns jointly with his mother. He owns no vehicle, had no bank accounts, savings accounts. He didn't have boats, planes." [Transcript of Sentencing, hereinafter referred to as Sentencing at TR 42.]

The district court determined that the "cash is someplace. I don't know where it is. It might be in a lockbox under an assumed name. It might be in a foreign bank account, although I don't think this defendant is sophisticated enough to handle a foreign bank account." The court concluded, "I'm going to find that he does have it someplace and I will take that into consideration in addressing the questions of the fine and cost of incarceration." [Sentencing, at TR 48.]

The court further stated, "he [petitioner] may not have the ability to pay a fine or the costs of imprisonment or the costs of supervision. On the other hand, the Court finds totally incredible the defendant's protestations of poverty. Therefore, the Court would impose a fine of $500,000 as well as the costs of incarceration and supervised release." [Sentencing, at TR 62.]

Under the Federal Sentencing Guidelines, the district court is directed to consider "the ability of the defendant to pay the fine." In this case, the court considered that ability and found that petitioner "may not have the ability to pay a fine." There was no evidence revealing "significant unexplained expenditures" by petitioner nor "unexplained possession of assets."

It is respectfully submitted that review should be granted to resolve this unsettled issue of whether a fine may be imposed under the Federal Sentencing Guidelines where there is no evidence of the ability of the defendant to pay such a fine. The importance of this question extends further than the instant case because incorrect or illegal application of the guidelines could occur in other cases. Because this Court has not previously decided this issue, it should be settled now.

3. Was the Petitioner Properly Sentenced by the District Court Under the Federal Sentencing Guidelines Where the District Court, by an Exercise of Its Discretion, Departed From the Guidelines?

In the Federal Sentencing Guidelines Manual, issued by the United States Sentencing Commission, under section 5K2.0:

> Under 18 U.S.C. sec. 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.' Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (*e.g.*, as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

As stated by the court of appeals in this case, petitioner was classified as a career offender under the guidelines, and his sentence would have been between 30 years and life imprisonment.

> But the court sentenced [petitioner] to 20 years in prison, to be followed by 10 years of supervised release, and a $500,000 fine. It expressed two reasons for its downward departure: that Hays had been caught with a relatively small amount of drugs, and that he had not used violence. The court found it particularly inappropriate to give Hays a life sentence because, '[W]hile it may express the will of Congress, this is not a life sentence operation. . . . [T]his is a small operation.' [*Hays*, 899 F.2d at 518-519.]

The district court detailed its reasons for the downward departure from the guidelines as follows:

> The defendant's involvement in the drug trafficking business is not disputed. However, in comparison to other career offenders involved in the drug trafficking industry, this defendant does not appear to have been involved with the large quantities of drugs that are routinely found in those cases. Likewise, the physical violence or threat of violence that often accompanies drug dealers was not evident in this case or anywhere in the defendant's history. The Court has before it an unusual case with both aggravating and mitigating circumstances which could not adequately have been taken into consideration by the Sentencing Commission in formulating the guidelines. [Sentencing, at TR 62-63.]

The district court was careful in its analysis of the aggravating and mitigating factors and attempted to impose a sentence that still "meets the sentencing objectives of

punishment, general deterrence and incapacitation." [Sentencing, at TR 63.] The district court considered the recommended sentence excessive in comparison to lower sentences imposed in preguidelines cases which involved larger amounts of drugs and the use of weapons and violence. [Sentencing, TR at 60.]

The court of appeals adopted a three-part test to determine the appropriate standard of review for departure.

> The first step is to determine whether the factors on which the district court relied are sufficiently unusual to warrant departure. This is a question of law, which is reviewed *de novo*. [Citation omitted.] The second step is to determine whether the circumstances, if they may be considered at all, actually exist in the case. This is a question of fact, which should not be disturbed unless clearly erroneous. [Citation omitted.] Only then should the court take the third step, which is to determine whether the weight the lower court gave to a particular circumstance, whether aggravating or mitigating, was reasonable; that is, whether the sentencing court abused its discretion. [Citation omitted.] If, as in the case before us, we conclude that the district court based its departure on factors the guidelines have adequately considered, our review need go no further. [*Hays*, 899 F.2d at 519.]

The court of appeals went on to state,

> Drug quantity, which is so important to setting the base offense level for other drug offenders, is explicitly to be disregarded when sentencing career drug offenders. [Citation omitted.] Because drug quantity has been adequately considered in this situation and ruled out as a mitigating factor, the district court erred as a matter of law by giving it any weight.

> The district court improperly relied on Hays' lack of violence for the same reason. A defendant receives a greater sentence if he uses a weapon or harms someone than if he does not; the absence of violence is implicitly considered to the extent that the punishment is not increased by giving additional sentencing points.
>
> . . .
>
> Because the lack of violence has been adequately considered in the guidelines, it could not serve as a cause for departure from the guidelines. [*Hays,* 899 F.2d at 520.]

However, in an upward departure case out of the Sixth Circuit, the court of appeals found that drug quantity "was relevant conduct for sentencing purposes under the Guidelines." *United States* v. *Anders,* 899 F.2d 570, 578 (6th Cir. 1990).

In another Sixth Circuit career offender case, *United States* v. *Maddalena,* 893 F.2d 815 (6th Cir. 1989), the court of appeals held "we remand this case to the District Court, instructing the judge that he may, but need not, consider the defendant's efforts to stay away from drugs as a basis for departing from the guidelines." *Id.* at 818.

The Eighth Circuit, in *United States* v. *Brown,* 903 F.2d 540 (8th Cir. 1990), has held "departure may be appropriate where the guidelines sentence overemphasizes the severity of the conduct or the defendant's criminal history." Id. at 544. Section 4A1.3 of the Federal Sentencing Guidelines Manual provides:

> There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will

> commit further crimes. . . . The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category, and therefore consider a downward departure from the guidelines.

The Eighth Circuit went on to state, "The overall policy provisions of the guidelines make clear that the Sentencing Commission did not intend to so completely restrict sentencing judges in this area" of departure in career offender cases. *Brown,* 903 F.2d at 545.

It is respectfully submitted that review should be granted to resolve this unsettled issue of when departure from the Federal Sentencing Guidelines is warranted in career offender cases. Because this Court has not previously decided this issue, it should be settled now.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
SEE SIXTH CIRCUIT RULE 24

Nos. 89-5029, 89-5157

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee, Cross-Appellant,*

v.

RICKY ALLEN HAYS, - - - *Defendant-Appellant, Cross-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Decided and Filed March 29, 1990

Before: MERRITT, Chief Judge; RYAN, Circuit Judge; and BROWN, Senior Circuit Judge.

BROWN, Senior Circuit Judge, delivered the opinion of the court, joined by RYAN, Circuit Judge. MERRITT, Chief Judge (pp. 11-12) delivered a separate concurring opinion.

BAILEY BROWN, Senior Circuit Judge. The defendant, Hays, appeals his conviction for conspiracy to possess cocaine and marijuana with intent to distribute (count 1), and possession of marijuana with intent to distribute (count 2). He also appeals the fine imposed. The government appeals his sentence. Because we find that there was ample evidence from which a rational trier of fact could infer guilt, we affirm the conviction. We further affirm the fine. But because we find that the district court improperly relied on certain factors to reduce the sentence of the de-

fendant, a career drug offender, we reverse the sentence and remand.

I

In May 1988, Detective Gary Epperson, a Louisville police officer working undercover, was investigating Steve Gordon, a suspected drug dealer. On two different dates, Gordon sold cocaine to a police informant while Epperson watched; both times the defendant Hays drove Gordon to the site, dropped him off, and waited for him at a nearby gas station. The informant told police that the driver of the car, Hays, supplied the cocaine, and described the car Hays was driving. After one of these sales, Hays and Gordon drove together to Hays' apartment.

The police got a warrant to search Hays, his apartment, and his car. They arrested Hays and Gordon that night as they left the apartment. In Hays' pocket police found a small set of scales, of the kind used to weigh drugs.

Inside the apartment, where Hays lived alone, police found seven pounds of marijuana, a triple beam scale, a smaller set of scales, drug paraphernalia, detailed records of Hays' drug trade, and $12,789 in cash. The marijuana had been packaged in small plastic bags in quantities ranging from one half ounce to one and one half ounces; some was loose but some had been compressed into bricks, which is the form in which it is shipped. More than $11,000 in large denominations was found in a black bag and still more money, about $1,700 wrapped with rubber bands, was found laying on a desk. At the time of his arrest Hays worked part-time as a painter and repairman, earning $6 an hour.

Police found no cocaine, although they did find paraphernalia usually associated with the cocaine trade, including a milk jug filled with the corners of plastic sandwich bags. The cocaine sold to the police informant had come in a corner cut off a plastic bag and tied in a knot.

The records, kept on loose sheets of paper, were found strewn around the apartment. Their careful notations give an account of Hays' daily drug trade, including the coded names of his customers, the quantities he sold, and the amounts he was owed. For example, frequent notations of the number eight enclosed in a circle stood for an "eight-ball," street language for an eighth of an ounce of cocaine. Similar references to pounds, ounces, grams, and the word "scored" are also apparent. Another notation mentions $96,200 in a box, although police found neither the money nor the box. From this ledger, Det. Epperson, a very experienced drug investigator, estimated that Hays sold as much as $12,000 worth of drugs per day.

Hays was convicted of conspiracy to possess cocaine and marijuana with intent to distribute under 21 U.S.C. § 846, as well as possession of marijuana with intent to distribute, under 21 U.S.C. § 841(a)(1). He had a long criminal record, but relevant here are two recent prior convictions for drug trafficking. Because of these prior convictions, Hays was classified as a career offender under the Sentencing Guidelines, and under the guidelines would have been sentenced to between 360 months and life imprisonment.

The district court, however, did not impose this sentence. Exercising discretion it believed it had, the court found that the small amount of drugs in Hays' apartment, and the fact that, though he had been a recurrent drug dealer he had not been a violent one, were "mitigating circumstances . . . [which] could not adequately have been taken into consideration by the Sentencing Commission . . . ." It sentenced Hays to 240 months for conspiracy and 120 months for possession, the sentences to be served concurrently; five years of supervised release; and a $500,000 fine. The sentences were to run concurrently with recent convictions in state and federal court for trafficking.

Hays challenges the sufficiency of the evidence used to convict him of conspiracy, as well as the size of his fine, and the government challenges the district court's departure from the guidelines.[1]

II

We are convinced there was ample evidence to support Hays' conviction for conspiracy.

Police twice watched Hays drive Gordon to sell cocaine to a police informant and then, on at least one of those occasions, return together to Hays' apartment. A search of that apartment proved these were more than isolated sales; police found marijuana which had been shipped in bulk, thousands of dollars in cash, and equipment used to process, measure, and package cocaine. *See also United States* v. *Bourjaily*, 781 F.2d 539, 545 (6th Cir. 1986), *aff'd*, 483 U.S. 171 (1987) (large amount of cocaine found in defendant's car created inference of a conspiracy).

The facts in *United States* v. *Resnick*, 745 F.2d 1179 (8th Cir. 1984) are quite similar to those in this case. There, an undercover policeman bought drugs from a man who bought them from the defendant. The man told police that he had bought cocaine from the defendant, and police saw the defendant drive to and from the place where the sales were made. The court held that this was sufficient evidence to uphold a conviction under 21 U.S.C. § 846, adding, "It is not necessary that the evidence preclude other reasonable possibilities." *Id.* at 1185.

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[1]We note that the government belatedly has submitted to the court an authorization of this appeal executed prior to the notice of appeal by the then-acting Solicitor General, as is required under 18 U.S.C. § 3742(b). This court would have been without jurisdiction to hear the government's appeal had such an authorization by the Solicitor General or Attorney General not been filed. The authorization should have been filed with the notice of appeal.

Most damning of all to Hays were the records, which reveal a busy and lucrative trade with dozens of buyers, netting as much as $12,000 a day. From these ledgers, which were kept with a bookkeeper's precision, Det. Epperson deduced that Hays had sold four pounds of cocaine and 250 pounds of marijuana in the six months prior to his arrest. Hays admits he was an addict, but these records show he was a businessman as well, a middleman who bought drugs in bulk and sold them for resale. *See also United States* v. *Grunsfeld,* 558 F.2d 1231, 1235 (6th Cir. 1977), *cert. denied,* 434 U.S. 1016 (1978) ("[W]here there is additional evidence beyond mere purchase and sale, from which knowledge of the conspiracy may be inferred, courts have upheld conspiracy convictions.").

Courts have been chary of inferring drug conspiracies from nothing more than scraps of paper which the government called records, particularly when those records were disorganized, or found outside the defendant's possession, *see United States* v. *Brown,* 584 F.2d 252 (8th Cir.), *cert. denied,* 440 U.S. 910 (1978), or formed the whole of the government's evidence. *See United States* v. *Ordonez,* 737 F.2d 793 (9th Cir. 1984). The government's case against Hays is more comprehensive than that. The scale of this operation, as revealed in the records, supported by the amount of drugs and paraphernalia found in the apartment, and confirmed by the fact that Hays drove Gordon to the site of two cocaine sales, persuades us that a rational trier of fact could have found beyond a reasonable doubt that Hays conspired with Gordon and others to sell cocaine and marijuana. *See Jackson* v. *Virginia,* 443 U.S. 307, 319 (1979).

III

We also reject Hays' appeal that the district court misapplied the Sentencing Guidelines by assessing a fine he

could not pay. A defendant convicted under 21 U.S.C. §841 could be fined up to $4.5 million; Hays was fined $500,000.

Section 5E1.2(d)(2) of the guidelines provides that, in determining the amount of a fine, a court must consider the defendant's ability to pay it "in light of his earning capacity and financial resources." The application notes for that section state that the court may consider any undisclosed income or assets of the defendant, or unexplained expenditures which are not consistent with his reported income.

The district court determined that Hays had unexplained assets, and so could afford to pay a large fine. It based this determination on the large amount of cash seized in Hays' apartment and the even larger amounts referred to in Hays' ledgers. A reference to $96,200 in a box was particularly emphasized. Although police have not found this money, the court believed that it did exist, and dismissed Hays' protestations of poverty as "totally incredible."

The alleged misapplication of the guidelines in this case raises a question of fact, and we accord great deference to the district court's findings. We cannot weigh the credibility of trial witnesses, including the testimony of Det. Epperson in explaining Hays' account records. Given the scale of Hays' operations, we cannot say that the district court's conclusion that he could pay a half million dollar fine was clearly erroneous.[2]

---

[2]We reject the government's contention that this court lacks jurisdiction to consider an appeal of a fine within the applicable sentencing range. It is clear from both the statute and the conference report which accompanied it that a defendant may appeal such a fine if the contention is that the guidelines were applied illegally or incorrectly. *See* 18 U.S.C. § 3742(a) (Supp. 1989); H. Rep. No. 1030, 98th Cong., 2d Sess. 80, *reprinted in* 1984 U.S. Code Cong. & Admin. News (98 Stat.) 3182, 3263.

IV

The government presents a more difficult question for our review. It argues that the district court improperly departed from the guidelines because the factors it relied on to reduce Hays' sentence are not mitigating circumstances under the guidelines. We agree, and remand the case for resentencing.

Hays had been convicted of drug trafficking at least twice before, and so was classified as a career offender under the guidelines. *See* U.S.S.G. § 4B1.1. Under the guidelines, his sentence would have been between 30 years and life imprisonment. But the court sentenced Hays to 20 years in prison, to be followed by 10 years of supervised release, and a $500,000 fine. It expressed two reasons for its downward departure: that Hays had been caught with a relatively small amount of drugs, and that he had not used violence. The court found it particularly inappropriate to give Hays a life sentence because, "[W]hile it may express the will of Congress, this is not a life sentence operation. . . . [T]his is a small operation."[3] The court "seriously" suggested that the government appeal the sentence, saying it "would like some guidance on the application of the guidelines and departure."

Courts must impose the sentence specified in the guidelines "unless . . . there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b)(Supp. 1989). But this discretion is not a license to depart from the guidelines at will; a court should not depart unless it

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[3]In spite of this statement, we assume that the district court considered that it was operating within the general context of the guidelines.

"finds an atypical case, one to which a guideline linguistically applies but where conduct significantly differs from the norm. . . ." U.S.S.G. Ch. 1, Pt. A, Introduction 4(b). "Whether departure is appropriate, then, depends in large part upon what circumstances the Sentencing Commission took into account in framing the guidelines." *United States* v. *Williams*, 891 F.2d 962, 964 (1st Cir. 1989).

The guidelines are a new feature in the law and so it is not surprising that courts have wrestled to find an appropriate standard of review for departure which gives deference to the district court's familiarity with the case, but not so much deference as to erode the guidelines into nothing. The First Circuit has proposed a three-part test which we believe strikes the appropriate balance. *See United States* v. *Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir. 1989).[4]

The first step is to determine whether the factors on which the district court relied are sufficiently unusual to warrant departure. This is a question of law, which is reviewed *de novo*. *See id.*; *United States* v. *Ryan*, 866 F.2d 604, 610 (3d Cir. 1989). The second step is to determine whether the circumstances, if they may be considered at all, actually exist in the case. This is a question of fact, which should not be disturbed unless clearly erroneous. *Diaz-Villafane*, 874 F.2d at 49; 18 U.S.C. § 3742(e) (Supp. 1989). Only then should the court take the third step, which is to determine whether the weight the lower court gave to a particular circumstance, whether aggravating or mitigating, was reasonable; that is, whether the sentencing court abused its discretion. *See Diaz-Villafane*, 874 F.2d at 49; *United States* v. *Rodriguez*, 882 F.2d 1059, 1067 (6th Cir. 1989); 18 U.S.C. §§ 3742(e)(3), (f)(2) (Supp. 1989). If, as

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[4]We note that while Judge Breyer, a member of the Sentencing Commission, did not author this opinion, he was a member of the panel and concurred therein.

in the case before us, we conclude that the district court based its departure on factors the guidelines have adequately considered, our review need go no further. *See Williams*, 891 F.2d at 964.

For an offender who is not, under the guidelines, a career offender, the amount of drugs determines the base offense level—the starting number of sentencing points from which the trial court may make adjustments, up or down, for aggravating or mitigating circumstances. *See* U.S.S.G. § 2D1.1(c). For all classes of drug felons except career offenders, the guidelines are finely calibrated to the amount and type of drugs involved. For drug felons who are not career offenders, the number of points given for a particular quantity of drugs is absolute; the sentencing court's role is almost clerical, to determine the amount of drugs involved and to consult the sentencing chart for the number of points assigned to that offense.

Without dispute, Hays is a career drug offender within the meaning of the guidelines. The guidelines state that such defendants are automatically given a high offense level based on the propensities they have demonstrated over time rather than on the particulars of their latest offense. *See* U.S.S.G. § 4B1.1. Drug quantity, which is so important to setting the base offense level for other drug offenders, is explicitly to be disregarded when sentencing career drug offenders. *See also United States* v. *Smith*, 887 F.2d 104, 108 n.6 (6th Cir. 1989) (suggesting that drug quantity is not a mitigating factor). Because drug quantity has been adequately considered in this situation and ruled out as a mitigating factor, the district court erred as a matter of law by giving it any weight.

The district court improperly relied on Hays' lack of violence for the same reason. A defendant receives a greater sentence if he uses a weapon or harms someone than if he does not; the absence of violence is implicitly

considered to the extent that the punishment is not increased by giving additional sentencing points. *See, e.g.*, U.S.S.G. § 2D1.1(b)(1) (higher offense level if criminal carried a firearm); § 2D1.5, note 2 (upward departure allowed in a continuing criminal enterprise if defendant sanctioned use of violence).

As if this proposition needed further support, the guidelines require that a criminal be sentenced as a career offender if he has two prior felony convictions involving either violence *or* drugs. Even the most pacifistic drug traffickers are to be severely punished. As the Sentencing Commission has written:

> A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence.

U.S.S.G. Ch. 4, Pt.A, intor. comment.

Because the lack of violence has been adequately considered in the guidelines, it could not serve as a cause for departure from the guidelines. *See also Williams*, 891 F.2d at 965 (district court erred, as a matter of law, by reducing sentence of defendant bank robber who had not carried a gun).

Hays has a "long as your arm" history of drug convictions. If the district court did not believe his was a "life sentence operation," it was free to sentence him at the low end of the very broad range allowed in the guidelines. But here the district court relied on factors which were thoroughly considered by the Sentencing Commission in such a case and so are not "suitable grist for the departure mill." *Williams*, 891 F.2d at 964.

Therefore, we AFFIRM the defendant's conviction and, because we determine that the sentence of incarceration was illegal, we REVERSE the sentence and REMAND for resentencing.

MERRITT, Chief Judge, concurring. For the reasons stated in my dissenting opinion in *United States* v. *Brewer*, No. 89-5371 (slip opinion at 17-24) federal appellate courts should use not a "de novo" standard of review in cases applying the new sentencing guidelines but a "due deference" standard as expressly required by the governing statute: "The Court of Appeals . . . shall give due deference to the district court's appliciaton of the guidelines. . . ." 18 U.S.C. § 3742(e). I would, therefore, apply an abuse of discretion standard to the question of whether the Sentencing Commission fully considered the particular combination of mitigating facts and circumstances which a district court has found to exist in a given case. The question of whether a given combination of sentencing facts makes a case "typical" or "atypical" (see *Guidelines Manual*, ch. I, § 4(b), Policy Statement, Nov. 1989) should be left to the district court under an abuse of discretion standard.

In this departure case, however, I do not find that the question is what standard of review we should follow in the ordinary departure case. Unlike other departure cases, the instant case does not concern the extent to which the Commission considered aggravating and mitigating factors in general, or considered the peculiar combination of aggravating and mitigating circumstances found in this case. Nor is the question one of the accuracy or reasonableness of the District Court's calculation and application of the Guidelines.

Rather than focus on the deference due district court decisions in ordinary departure cases, our case requires us to consider only the deference due an unequivocal congres-

sional pronouncement on the length of mandatory sentences to be imposed on a certain class of offenders. In 28 U.S.C. § 994(h) (Supp. 1989), Congress explicitly required that "the Guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized [by statute]" for particular third-time offenders. The defendant Hays is concededly such an offender. Turning then to 28 U.S.C. § 841(b)(1)(B)(ii)(II) (Supp. 1989), which prescribes the penalty for the offense for which Hays was convicted, we find that Congress designed a sentence range of 10 years to life for non-career offenders. For purposes of sentencing third-time offenders under 28 U.S.C. § 994(h), therefore, the "maximum term authorized" is life imprisonment. With this in mind, the Sentencing Commission created a "career offender" provision, which, in Hays's case, sets a sentence of 30 years to life. *See Guidelines* § 4B1.1.

As a result of the interplay of these statutory provisions, the issue appropriate for appellate review is whether the District Court's sentence in this case of 20 years is a sentence "at or near the maximum term authorized," as the statute requires. A 20-year sentence is not "at or near" life imprisonment and therefore does not follow the intent of Congress that such career offenders receive the "maximum term authorized" under the statute. It is on that basis that I would reverse the District Court's opinion. I would remand it to the District Court for sentencing in line with the intent expressly set out for career offenders in 28 U.S.C. § 994(h) and 21 U.S.C. § 841(b)(1)(B)(ii)(II).

APPENDIX B

No. 89-5029/5157

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee, Cross-Appellant,*

v.

RICKY ALLEN HAYS, - - - *Defendant-Appellant, Cross-Appellee.*

ORDER—Filed May 16, 1990

BEFORE: MERRITT, Chief Judge; RYAN, Circuit Judges; and BROWN, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) Leonard Green
Leonard Green, Clerk